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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL ANTHONY CERNAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Appellant's waiver of appeal contained in the plea agreement is ineffective, allowing Appellant to move forward with substantive arguments that: (1) the District Court erred in calculating the applicable sentencing guidelines range; and (2) Appellant's sentence was unreasonable.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the Caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Cernak respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision below was submitted in a memorandum from the United States Court of Appeals for the Ninth Circuit on September 19, 2008. (App., p. 1-3.) A timely Petition for Rehearing was denied in an order filed January 9, 2009. (App., p. 4.) The above mentioned decisions are not reported.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under 18 U.S.C. §3742(a) (2003) (review of sentences imposed by district courts) and 28 U.S.C. §1291 (1982) (review of final decisions by district courts). This Court has jurisdiction under 20 U.S.C. §1254(1)

STATUTORY AND CONSTITUTIONAL PROVISIONS

Title 18 of the United States Code Section 3742 governs the review process of a sentence. It states in relevant parts:

(a) Appeal by a Defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(c) Plea Agreements. – In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure –

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(f) Decision and Disposition. – If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

> (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
>
> (3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

These and other relevant laws are reproduced in App., pp. 17-27.

STATEMENT OF THE CASE

I. PETITIONER'S BACKGROUND

Michael Anthony Cernak is a 29-year-old man. Mr. Cernak was arrested on November 13, 2003 for bank robbery, and has been incarcerated since that date. He has an extensive history of mental illness, and each of the three evaluators who examined Mr. Cernak in successive determinations of his competence to stand trial during his incarceration after arrest found that he suffers from a psychological disease of either Schizoaffective Disorder or Psychotic Disorder – Not Otherwise Specified. He experiences hallucinatory ideations when not properly medicated, and combined with dependence upon alcohol his judgment is often impaired.

Mr. Cernak's upbringing was incredibly tumultuous, involving physical, sexual, and emotional

abuse at the hands of his parents, who were both hard drug users. His parents were often absent or utterly negligent, and Mr. Cernak spent time living on the streets beginning at the age of twelve. The offenses with which Mr. Cernak was charged arose, at least in part, from the desperation of a damaged young man whose prospects were, in his mind, exceptionally few. Mr. Cernak offers this brief retelling the details of which are laid out more fully in Defendant's Sentencing Memorandum, not as a set of excuses, but rather as context for his actions.

II. THE INDICTMENT

The Petitioner was arrested on November 13, 2003 for bank robbery. On November 26, 2003, an indictment was filed charging Petitioner with one count of bank robbery (18 U.S.C. §2113(a)), five counts of armed bank robbery (18 U.S.C. §2113(a) & (d)), five counts of possession of a firearm during and in relation to a crime of violence (18 U.S.C. §924(c)(1)(A)(ii) & (c)(1)(C)(i)).

III. COMPETENCY DETERMINATIONS

Mr. Cernak was evaluated for his competence to stand trial three separate times during his incarceration following arrest. All three evaluators concurred that Mr. Cernak suffered from thought and mood disturbances. The initial evaluator, Dr. Jasmine Tehrani of the Forensic Evaluation department at the Metropolitan Detention Center – Los Angeles, in 2004

found Mr. Cernak lacked the capacity to assist his counsel in any meaningful or rational manner. Dr. Tehrani found Mr. Cernak's "thought processes were tangential and he exhibited considerable difficulty remaining on the same topic . . . [which] reflected some type of psychotic thought process."

The second and third evaluators, Dr. Warden Weaver and Katherine Skillestad, Ph.D., also diagnosed Mr. Cernak with Schizoaffective Disorder, defined as experiencing uninterrupted periods of illness in which there is major depression, manic or mixed episodes with concurrent symptoms such as delusions or hallucinations. With medication and treatment in prison medical facilities, Mr. Cernak's competency to stand trial was deemed by the district court on March 22, 2006, to have been restored.

IV. THE GUILTY PLEA

On September 18, 2006, Petitioner pled guilty to charges of bank robbery as set forth in counts one, two, four, six, eight, and ten of the indictment, and to the charge of possession of a firearm in relation to a crime of violence as set forth in count eleven of the indictment. Charges of possession of a firearm in relation to a crime of violence as set forth in counts three, five, seven, and nine were dismissed. Mr. Cernak agreed to the forfeiture of items listed in counts twelve and thirteen of the indictment.

Seventeen days prior to his guilty plea, on September 1, 2006, Mr. Cernak entered into a plea

agreement with the Government. (App., pp. 28-34.) Mr. Cernak stipulated the following factual bases:

1. The defendant is pleading guilty because the defendant is guilty of the charged offenses.

2. In pleading to the offenses, the defendant acknowledges that if the defendant elected to go to trial instead of entering this plea, the United States could prove facts sufficient to establish the defendant's guilt beyond a reasonable doubt.

3. The defendant specifically admits and declares under perjury that all of the facts set forth below are true and correct:

Count I: Bank Robbery

4. On or about November 13, 2001 the defendant took $13,200 in U.S. Currency belonging to the Nevada First Bank. He took this money from the employees of Nevada First Bank.

5. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

6. At the time the defendant committed this offense the deposits of the Nevada First Bank were insured by the Federal Deposit Insurance Corporation.

Count II: Armed Bank Robbery

11. On or about July 26, 2002 the defendant took $6,500 in U.S. Currency belonging to the Bank of America. He took this money from employees of Bank of America.

12. In the commission of this offense the defendant used force and violence or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

13. Cernak possessed a firearm during the commission of this robbery.

14. At the time the defendant committed this offense the deposits of the Bank of America were insured by the Federal Deposit Insurance Corporation.

Count VI: Armed Bank Robbery

15. On or about September 6, 2002 the defendant took $12,520 in U.S. Currency belonging to the Bank of America. He took this money from the employees of Bank of America.

16. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

17. Cernak possessed a firearm during the commission of this robbery.

18. At the time the defendant committed this offense the deposits of the Bank of America were insured by the Federal Deposit Insurance Corporation.

Count VIII: Armed Bank Robbery

19. On or about December 13, 2002 the defendant took $80,000 in U.S. Currency belonging to the Community Bank of Nevada. He took this money from the employees of Community Bank of Nevada.

20. In the commission of this offense the defendant used force and violence or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

21. Cernak possessed a firearm during the commission of this robbery.

22. At the time the defendant committed this offense the deposits of the Community Bank of Nevada were insured by the Federal Deposit Insurance Corporation.

Count X: Armed Bank Robbery

23. On or about November 10, 2003 the defendant took $62,440 in U.S. Currency belonging to the Wells Fargo Bank. He took this money from employees of Wells Fargo Bank.

24. In the commission of this offense the defendant used force and violence or intimidation by giving the bank teller a demand note that threatened her

with bodily harm, if she did not comply with his demand for money.

25. Cernak possessed a firearm during the commission of this robbery.

26. At the time the defendant committed this offense the deposits of the Wells Fargo Bank were insured by the Federal Deposit Insurance Corporation.

Count XI: Possession of a Firearm During and In Relation to a Crime of Violence

27. On or about November 10, 2003 the defendant committed a crime of Armed Bank Robbery.

28. During the commission of that crime, the defendant possessed an S & W Desert Eagle .40 caliber semi-automatic pistol.

29. The defendant possessed or carried the firearm during and in relation to the crime of Armed Robbery. The defendant brandished this firearm by showing it to a bank employee while threatening the employee.

30. All of the acts listed in all counts above occurred in the State and federal district of Nevada.

(App., pp. 37-42.)

Mr. Cernak and the Government further agreed to a base offense level for counts one, two, four, six, eight, and ten of 34, under U.S.S.G. §3D1. The parties agreed that the Government would recommend a

total of three levels of adjustments for acceptance of responsibility, for a total base offense level of 31. (App., pp. 29-32.) At total offense level 31 and criminal history category I, the recommended range of sentence under the guidelines for counts one, two, four, six, eight, and ten was between 108 and 135 months. Count eleven carried a mandatory sentence of 84 months, consecutive with the sentence imposed on the other counts.

The plea agreement included a purported waiver of appeal, in which Mr. Cernak agreed to waive his right to appeal any sentence of either twenty-five or twenty-four years or less.[1] The waiver also purported to foreclose any appeal of "the manner in which th[e] sentence was determined on the grounds set forth in Title 18, United States Code, Section 3742," and to waive appeal of "any other aspect of the conviction or sentence, including any order of restitution." The waiver closed with confusing language indicating that "the parties are free to argue on appeal and collateral review of the Court's sentencing guidelines calculations are not error."

On September 18, 2006, the district court conducted a plea colloquy; they did not address the waiver of appeal, nor did it inquire of the Defendant

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[1] The Plea Agreement is not clear. It states that the defendant "waives the right to appeal any sentence that is imposed at twenty-five years or less . . . ," but goes on further to state he "reserves only the right to appeal any portion of the sentence that is higher than twenty-four years imprisonment."

to ascertain whether the waiver of appeal was knowing and voluntary. At the close of the colloquy, the district court received Petitioner's plea of guilty.

V. SENTENCING

Petitioner's sentencing memorandum discussed his hardships as well as the sentencing factors contained in 18 U.S.C. §3553(c). The memorandum applied the factors contained within the Code to the facts of the case and analyzed them in relation to Petitioner's personal situation. It also discussed Mr. Cernak's psychological infirmities. Petitioner requested a sentence of 17 years, or 204 months, which was in the middle of the applicable guideline range of 192-219 months.

The Government's sentencing memorandum lacked analysis. Its main focus was aimed at the factual circumstances of the crimes for which Petitioner was charged. It lacked consideration of any sentencing factor other than sensational retellings of the bank robberies. The Government requested a sentence of 24 years, or 288 months, without mentioning the requested sentence was nearly seventy (70) months above the applicable sentencing guidelines range.

On December 8, 2006, the district court conducted its sentencing and disposition hearing regarding this matter. The district court heard from the Petitioner, counsel from both parties, Petitioner's sister, Federal Bureau of Investigation Special Agent

Dean Abbott, and one of the bank tellers present at one of the robberies for which Petitioner was being sentenced. At the close of the hearing, the district court sentenced Mr. Cernak to 24 years, or 288 months, in prison.

REASONS FOR GRANTING THE PETITION

The Petitioner asserts that waivers of rights to appeal in a plea agreement cannot be enforced if doing so would result in a miscarriage of justice. *United States v. Shockey,* 538 F.3d 1355 (2008). Waivers will be binding so long as (1) the written plea agreement clearly delineates the scope of the waiver; (2) the district court inquired specifically at the plea hearing about any waiver of appellate rights; and (3) the denial of the right to appeal would not constitute a miscarriage of justice. *United States v. Edelen,* 539 F.3d 83 (1st Cir. 2008). Petitioner calls the Court's attention to (2) in the present case in requesting the grant of this petition.

Petitioner should be granted the opportunity to proceed with his appeal either because (1) the waiver of appeal contained in his plea agreement is entirely ineffective because the district court failed to determine its knowing and voluntary character; or (2) because specific exceptions to the waiver apply in light of the present circumstances. The district court erred in calculating the sentencing guidelines range, and did not offer sufficiently specific reasons for

imposing an above-guidelines sentence, as required by statute. It is for these reasons that this petition should be granted and allow the substantive arguments to move forward.

I. MR. CERNAK SHOULD BE ALLOWED TO PROCEED WITH HIS APPEAL DESPITE THE WAIVER OF APPEAL CONTAINED IN THE PLEA AGREEMENT

Petitioner acknowledges that he entered into a plea agreement that contained an express waiver of certain of his rights to appeal. The plea agreement provides, in pertinent part, as follows:

G. Waiver of Appeal

In exchange for the concessions made by the United States in this plea agreement, defendant knowingly and expressly waives the right to appeal any sentence that is imposed at twenty-five years or less or consistent with the parties (sic) joint recommendation, further waives the right to appeal the manner in which that sentence was determined on the grounds set forth in Title 18, United States Code, Section 3742, and further waives the right to appeal any other aspect of the conviction or sentence, including any order of restitution. Defendant reserves only the right to appeal any portion of the sentence that is higher than twenty-four years imprisonment. Defendant specifically waives his right to appeal the denial of his motion to suppress.

Notwithstanding the stipulations in this agreement, the parties are free to argue on appeal and collateral review that the Court's sentencing calculations are not error. However, each party agrees to maintain its view that the calculations in paragraph C are consistent with the facts of this case.[2] (App., pp. 33-35.)

In the first instance, the waiver of appeal is ineffective and Petitioner's present appeal should be allowed to proceed on the substantive issues because the district court did not inquire of the Defendant specifically as to the waiver, either at the plea colloquy or at any other time, in order to ascertain whether he knowingly, voluntarily, and intelligently agreed to waive the appellate rights mentioned in the plea agreement. Second, Petitioner contends that the district court committed error in calculating his sentence under the guidelines, an issue that would fall under the explicit exception to the waiver contained in the waiver's second paragraph, when that paragraph is properly construed. Third, owing to Petitioner's argument below regarding the failure of the district court to specifically state its reasons for the imposition of its above-guidelines sentence in this matter, as is required by 18 U.S.C. §3553(c),

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[2] As previously noted, the language of this second paragraph is unclear. It includes confusing language regarding the freedom to argue on appeal that the district court's calculations are "not error," which presupposes both an appeal and an argument that the court's calculations were, in fact, erroneous.

Petitioner submits that the waiver – even if effective in other ways – should not bar him from challenging his sentence as having been imposed in a manner contrary to law.

A. THE DISTRICT COURT'S PLEA COLLOQUY DID NOT MEET THE REQUIREMENT THAT IT DETERMINE WHETHER MR. CERNAK'S WAIVER OF APPEAL WAS KNOWING AND VOLUNTARY

A defendant may waive his statutory right to appeal his sentence, but the waiver of an important constitutional or statutory right must be knowing and voluntary in order to be valid. *United States v. Mezzanetto,* 115 S.Ct. 797, 801 (1995). 18 U.S.C. §3742 affords a defendant the right to appeal the sentences imposed upon him, and any waiver of that right thus must be knowing and voluntary, or it will be ineffective.

Indeed, Fed.R.Crim.P. 11(b)(1)(N) mandates that:

> Before the court accepts a plea of guilty . . . the court must address the defendant personally in open court . . . During this address, the court must inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence.

This is to ensure that the judge – the individual who will be weighing the information proffered in

sentencing memoranda, pre-sentence reports, or given in live testimony before the court – is satisfied that the defendant has entered into the waiver with full, or at least sufficient, knowledge of the consequences it carries. As this Court found in *United States v. Arellano-Gallegos,* 387 F.3d 794 (9th Cir. 2004), a general inquiry as to whether the defendant understood the terms of his plea agreement does not satisfy the requirements of Rule 11(b)(1)(N) that the waiver be explicitly addressed at the plea colloquy.

Here, at the plea colloquy conducted at Petitioner's change of plea proceeding on September 17, 2006, the district court made no mention at all of the waiver of appellate rights contained in the plea agreement. The court asked if Mr. Cernak had read the plea agreement, whether he had talked about the plea agreement with his attorney, and the court was very clear in asking about certain of his rights that Mr. Cernak was waiving by pleading guilty: right to a trial by jury, right to cross-examine witnesses, and right to remain silent regarding the changes. At no time did the court seek to determine whether Mr. Cernak's waiver of appellate rights was knowing and voluntary, or even if he understood the implications of the waiver. In a case in which Mr. Cernak's competency to stand trial was an ongoing issue requiring three separate competency evaluations, the court, pursuant to Rule 11, should have inquired about Mr. Cernak's waiver of appeal. The waiver, as is seen in its actual language, is not a blanket waiver, but

includes several conditions, exceptions, and some confusing language, and the need to determine the Defendant's understanding of its terms was manifest. This the court did not do.

In fact, at the sentencing hearing of December 8, 2006, the court was apparently unaware that Mr. Cernak had agreed to waive any of his appellate rights. In exchange, the Government did not properly represent the appellate waiver in any event, because its clear language – and more importantly, its unclear language – admits of more than one interpretation of his precise waiver of appellate rights. The bare fact that the waiver was mentioned at sentencing in the exchange cited above, even if it has been more extensive, does not retroactively satisfy Rule 11's requirements. *See Arellano-Gallegos,* 796-797.

Having not mentioned or inquired about the waiver at the plea colloquy and then evincing no knowledge or recollection of the waiver at sentencing, while discussing the Defendant's potential appeal and stating equivocally after being informed of the existence of a waiver that "it may be a moot point," the district court did not demonstrate that it had satisfied itself, to the extent required under Rule 11, that Mr. Cernak's appeal waiver was knowing and voluntary.

It may be true that, under the facts of a particular case, a perfect Rule 11 plea colloquy is not an iron prerequisite for a valid waiver of appeal. *See United States v. Michlin,* 34 F.3d 896 (9th Cir. 1996). Yet,

Michlin does not operate as a complete and utter release from the requirements of Fed.R.Crim.P. 11(b)(1)(N). Courts reviewing appeal waivers should "look to the circumstances surrounding the signing and entry" of agreement. *United States v. Johnston,* 199 F.3d 1015, 1020 (9th Cir. 1999). In so doing, the *Johnston* Court wrote, "[a]lso relevant is whether the district court informed the defendant of [his] appellate rights and verified [his] intent to forfeit them." *Id.* the district court here did not so inform or canvass Mr. Cernak of his intent to forfeit appellate rights, and the circumstances surrounding the entry of his agreement argue that such a canvass was necessary.

There was a complete lack of a record to ensure that Petitioner understood the consequences of waiving certain of his rights to appeal seriously affects the fairness, integrity, and public reputation of plea proceedings. The waiver, therefore, should be found ineffective to bar the appeal, and petition for the writ should be granted.

B. THE DISTRICT COURT ERRED IN ARRIVING AT ITS CALCULATION OF THE APPLICABLE RANGE UNDER THE SENTENCING GUIDELINES

There are alternative grounds for allowing this appeal to proceed should the Court find that the district court's plea colloquy did, in fact, meet the stringent requirements of Rule 11 regarding inquiry of defendants as to appeal waivers contained in plea

agreements. The language of the appellate waiver, cited above, to the effect that "notwithstanding the stipulations in this agreement, the parties are free to argue on appeal and collateral review that the Court's sentencing calculations are not error," is either very poor drafting or an illusory exception designed to obscure or having the effect of obscuring Mr. Cernak's appeal rights in the wake of entering into the plea agreement.

Taking the language on its own opaque terms, the purported exception would appear to allow a party to argue that the district court did not err in its guidelines calculations regarding sentencing. This is nonsensical, because that right could only be exercised in response to an argument that the court *did err* in its calculations. That initial argument could only come on appeal or collateral attack. On its own terms, therefore, the language seems to contemplate the very appeal that the rest of the waiver attempts to foreclose. As plea agreements are routinely considered as contracts of adhesion, given the enormous bargaining power of the government, the contradiction and tension between an interpretation foreclosing appeal and an interpretation allowing an appeal should be construed in favor of Petitioner's right to proceed with the present appeal. *See, e.g., United States v. Johnson,* 992 F.Supp. 437, 439-440 (D.D.C. 1997); *see also United States v. Mezzanetto,* 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("As the Government conceded during oral argument, defendants are generally in no position to challenge demands for

these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.")

The same result, and just resolution, can be reached by determining that the parties intended to allow an appeal arguing error by the district court regarding its guidelines calculations.

Mr. Cernak does, in fact, argue that the district court erred in its calculations of the proper guidelines sentence. In fact, it appears from the record that, up until the very moment sentence was pronounced, the court had made no guidelines calculations at all.

Throughout the sentencing hearing held on December 8, 2006, the district court appeared unaware that it was about to impose a sentence above the range provided for under the guidelines. As noted previously, at a total offense level of 31 and criminal history category I, the recommended range of sentence under the guidelines for counts one, two, four, six, eight, and ten was between 108 and 135 months. Count eleven carried a mandatory sentence of 84 months, consecutive with the sentence imposed on the other counts. The total range for petitioner's sentence under the guidelines, properly computed, was between 192 and 219 months. U.S.S.G. §3D1.

It is apparent that the district court was under the impression that the two sentences recommended by the Government and Defendant, respectively, merely represented the high and low called for under guidelines calculations. The district court went on to

sentence Mr. Cernak to 24 years incarceration, or 288 months.

Mr. Cernak submits that the record evinces a fair amount of misapprehension regarding the nature and character of the appropriate guidelines and their relation to the sentence that was about to be imposed. The 17 year sentence request (204) months was not the minimum under the appropriate guidelines calculation; the range applicable to Mr. Cernak was between 192 and 219 months. Petitioner's request added twelve months – a full year – to the bottom of the guidelines range. Defendant, therefore, requested no downward departure and did not even limn the bottom of the appropriate range. The district court's characterization of Mr. Cernak's request as the "minimum under the guidelines" was in error, and it perhaps reveals a too-quick expectation that defendants will request the minimum and the Government the maximum under the guidelines in most cases. That was not the case here.

II. THE DISTRICT COURT'S IMPOSITION OF A SENTENCE OF 288 MONTHS WAS UNREASONABLE

This Court recently established a test for evaluating sentences in the wake of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). "First we determine whether the district court properly calculated the applicable range under the advisory guidelines." *United States v. Mohamed*, 459 F.3d 979, 985

(9th Cir. 2006). Thereafter, this Court will inquire whether the sentence imposed was reasonable, regardless of whether the sentence fell within or without the advisory guidelines range. *Id.*

Here, the district court erred in its calculation of the guidelines sentence, both substantively and by not employing the appropriate guidelines range as its starting point for determining its sentence. Furthermore, even if this Court finds proper calculation and employment of the guidelines by the district court, the sentence of 288 months – well above the guidelines range – was unreasonable because it was not supported at sentencing by a sufficient declaration by the court of its reasons for imposing it, as is required under 18 U.S.C. §3553(c).

A. THE DISTRICT COURT DID NOT PROPERLY CALCULATE THE APPLICABLE RANGE UNDER THE ADVISORY GUIDELINES

Before this Court can conduct a review of the reasonableness of a particular sentence imposed by the district court, the first step, under *Mohamed* is to determine whether the sentencing court complied properly with sentencing procedures. The initial determination involves whether the sentencing court properly calculated the appropriate sentencing range under the advisory guidelines. *Mohamed*, at 985. Mr. Cernak's argument above concerning the district court's misapprehension regarding the appropriate

sentencing range applicable to him, the relation of the parties' requested sentences to that range, and the court's mischaracterization of Mr. Cernak's requested sentence as the "minimum" under the guidelines is here incorporated in full to support Appellant's further argument that the district court erred materially in its guidelines calculations for the purposes of a reasonableness review by this Court. All of the misapprehensions noted above combined to evince that the district court had not arrived at an appropriate calculation of the applicable guidelines range before pronouncing sentence.

Moreover, it is clear from this Court's jurisprudence that proper "calculation" of the guidelines ranges involves more than just mathematical or administrative correctness. Calculating the appropriate guidelines range is an analytical process, one which the district court did not follow in this instance. In *United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006), this Court stated that "If there was material error in the Guidelines calculation that serves as the starting point for the district court's sentencing decision, we will remand for resentencing pursuant to 18 U.S.C. §3742(f), without reaching the question of whether the sentence as a whole is reasonable. . . ." This Court reiterated this language in *United States v. Staten*, 466 F.3d 708, 710, 713 (9th Cir. 2006), as it had in its previous opinion in *United States v. Staten*, 450 F.3d 384, 393 (9th Cir. 2006) (vacated and remanded) when it wrote that "Although the Guidelines do not control the district

court's ultimate sentence any longer, they must, as a first step, be consulted and accurately assessed." Furthermore, as this Court wrote in *United States v. Mix*, 457 F.3d 906, 911 (9th Cir. 2006), "In order to calculate the applicable Guidelines range for a case, a sentencing court must first determine which Guidelines apply to the case." This language makes absolutely clear that consideration of the proper guidelines range is a "first step," and a "starting point" from which the district court then applies its discretion to impose a reasonable sentence. The failure to *first* determine the applicable guidelines, therefore, represents error in their calculation for purposes of review of sentencing by this Court.

Here, the district court, as noted, apparently was unaware of the proper guidelines range. Given the record and transcript of the sentencing hearing provided above and it surely cannot be said that the court took a proper calculation of the appropriate guidelines range as its starting point or its first step in determining Mr. Cernak's sentence. Instead, the court appears to have been informed of the appropriate range only at the sentencing hearing, to have more or less ignored that discovery even though it affected the court's own characterization of the requested sentences, and to have imposed a sentence it likely had already found reasonable on its own, without regard to the guidelines range. As is shown by the transcript, the district court sentenced Mr. Cernak to 288 months only seconds after having been informed that the sentence was above the applicable

guidelines. This error, though perhaps analytical as opposed to mathematical, still deprived Mr. Cernak of his rights to an appropriate determination of a reasonable sentence. This Court should, on this basis alone, remand this matter to the district court for resentencing.

B. THE DISTRICT COURT FAILED TO STATE REASONS SUFFICIENT TO JUSTIFY THE ABOVE-GUIDELINES SENTENCE, THEREBY FAILING TO MAKE A SUFFICIENTLY CLEAR RECORD PERMITTING MEANINGFUL REVIEW BY THE COURT

18 U.S.C. §3553(c) requires the district court, "at the time of sentencing, [to] state . . . reasons for its imposition of the particular sentence." When the sentence imposed falls outside the appropriate range under the guidelines, the court must also state "the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment. . . ." 18 U.S.C. §3553(c). General discussion of reasons for imposing a sentence outside the guidelines, or simple recitations of the litany of sentencing factors contained in the statute will not do, and this Court has required district courts to "provide the specific reason for the imposition of a sentence different from that described" in the guidelines. *United States v. Miqbel*, 444 F.3d 1173, 1178 (9th Cir. 2006).

Here, the district court's misapprehension of the appropriate guidelines range and the relation of the requested sentences to that range, identified above, led, quite understandably, to a failure to state with sufficient specificity, the reasons the court imposed the above-guidelines sentence that it did. Perhaps unaware until the end of the sentencing hearing that the sentence it was about to impose was above the guidelines range, it was unlikely that the district court would have sufficiently stated its reasons for doing so during the previous portion of the hearing. That stands to reason: not expecting the need for stating those reasons, the court did not attempt to do so.

Even if the district court had, in its discussion of its sentence, covered enough ground to satisfy this Court that 3553(c) had been complied with, there is a distinct difference between the district court having done so inadvertently and it having done so specifically *because* it was about to pronounce an above-guidelines sentence. Specific reasons must be given "at the time of sentencing" according to 3553(c), and this Court found in *Miqbel* that discussion occurring at some earlier point, even at the sentencing hearing but before the ruling of the court, was not at the time of sentencing, and therefore could not be said to have satisfied the statute's requirements. *Id.*, 1178-1179. And in *Miqbel*, of course, there was not the added confusion over whether the sentence was within or outside the guidelines that was present here.

In point of fact, the transcript of the sentencing hearing evinces some confusion over the district court's need to state its specific reasons for its sentence, and whether it had done so prior to realizing the sentence was above guidelines. After being advised that the sentence was above guidelines and after pronouncing sentence, the district court replied to a comment from U.S. Probation Officer Lucille Monterde requesting reasons for the court's sentence:

THE COURT: But I don't want them to – they wouldn't be different than what I've said here in Court.

I think I've addressed the factors under 18 U.S. Code Section 3553 and articulated that I find the total 24 year sentence, which is the aggregate total, to be reasonable and necessary to reflect the seriousness of the crime; promote respect for the law; provide just punishment; afford adequate deterrence to criminal conduct; protect the public from further crimes of this defendant; provide the defendant with adequate education and training; and to avoid sentencing disparities.

Maybe I didn't articulate: the education and training he'll receive in prison I think will be very important in his particular case given his history, but I'm not sure I know what other Talismanic phrases I need to –

OFFICER MONTERDE: That will cover it, your Honor.

This, however, is a mere recitation of the sentencing factors written into 3553(c), akin to a mere reassurance that the court knows of and had accounted for those factors. The district court had made a similar recitation previously during the sentencing hearing, attempting to show that the guidelines – which at that moment the court was still under the impression it was applying – offered useful guidance in imposing sentence. There are, of course, no talismanic phrases that cover the ground necessary to satisfy the district court's obligations under the statute, nor should there be. There should be, however, a reasoned application of the 3553(c) sentencing factors to the defendant, and a specific statement of how and why those factors combined with the judge's reasoning resulted in a particular sentence. When that sentence is outside the range contemplated by the sentencing guidelines, the need for such a specific statement is even greater.

The reflexive nature of the district court's statement of reasons here – the sentence promotes respect for the law because it promotes respect for the law; it provides just punishment because it provides just punishment, etc. – falls short of statutory requirements in sentencing. Neither does it permit meaningful review by this Court of the reasonableness of the sentence. *See United States v. Montenegro-Rojo*, 908 F.2d 425, 428 (9th Cir. 1990), cited in *United States v. Musa*, 220 F.3d 1096 (9th Cir. 2000) (reasons for varying from guidelines "must be sufficiently specific to allow this court to conduct a meaningful review.").

The district court here thought the sentence it imposed was just, that it would provide deterrence, or that it avoids disparities in sentencing. All of those may be true, and an accurate reflection of the lower court's sentiments; they are not, however, specific reasons susceptible to meaningful review by this Court.

Should this Court determine that there was no error on the part of the district court in calculating the guidelines sentence in this matter, the Court should then determine that the sentence imposed was unreasonable due to the insufficient specificity of the reasons given by the district court.

III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ANTHONY CERNAK, Defendant-Appellant.	No. 06-10762 D.C. No. CR-03-00534-PMP MEMORANDUM* (Filed Sep. 19, 2008)

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Submitted September 11, 2008**
San Francisco, California

Before: O'SCANNLAIN, GOULD, and BEA, Circuit Judges

Petitioner-Appellant Michael Cernak appeals from the district court's imposition of his sentence after he pled guilty to several charges of bank robbery, armed bank robbery, and related charges. The facts are known to the parties and need not be

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

repeated here, except as necessary to explain our decision.

Cernak argues that the waiver of his right to appeal, included in the plea agreement he signed, is ineffective because the district court never ensured that he understood the waiver and, therefore, it was not knowing and voluntary. *See United State* [sic] *v. Bibler,* 495 F.3d 621, 623-24 (9th Cir. 2007). We "look to the circumstances surrounding the signing and entry of the plea agreement" to determine whether a waiver was knowing and voluntary. *United States v. Anglin,* 215 F.3d 1064, 1066 (9th Cir. 2000). We are satisfied that, since Cernak signed the plea agreement (including the waiver), confirmed that he read, understood, and had discussed it with his attorney, and agreed with the prosecutor's summary of the agreement in open court, he waived his right to appeal knowingly and voluntarily. Cernak also suggests that the Rule 11 colloquy was deficient because the prosecutor, not the district court, summarized the agreement. Even if it were a violation of Rule 11, it does not rise to the level of plain error, which is our standard of review in this case because Cernak failed to object to the prosecutor's summary of the plea agreement at the plea hearing. *See United States v. Siu Kuen Ma,* 290 F.3d 1002, 1005 (9th Cir. 2002).

Since Cernak's waiver is effective, his appeal must be dismissed unless he expressly reserved his right to appeal by the terms of the agreement. *See United States v. Jacobo Castillo,* 496 F.3d 947, 954 (9th Cir. 2007). Even if we construe the plea

agreement in Cernak's favor, the agreement still reserved only his right to appeal sentences of greater than twenty-four years imprisonment. Cernak was sentenced to precisely twenty-four years imprisonment; therefore his reservation does not apply and his appeal must be dismissed under the enforceable plea agreement.[1] *See United States v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000).

For the foregoing reasons, the appeal is

DISMISSED.

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[1] Because we find that Cernak has waived his right to appeal his sentence, we do not reach his substantive challenges to the sentence that the district court imposed. *See, e.g., United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991).

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

V.

MICHAEL ANTHONY CERNAK

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:03-cr-534-PMP-RJJ

USM Number: 38601-048

Rene M. Valladares
Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1, 2, 4, 6, 8, 10, AND 11 OF THE INDICTMENT

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty

The Defendant is adjudicated guilty of these offenses:

Title & Section	Nature Of Offense	Offense Ended	Count
18 USC 2113(a)&(d)	Armed Bank Robbery	11/10/2003	1, 2, 4, 6, 8, 10
18 USC 924(c)(1)(A)(ii) & (c)(1)(C)(i)	Possession of a Firearm During and in Relation to a Crime of Violence	11/10/2003	11

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) 3, 5, 7 and 9 ☐ is X are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/8/2006
Date of Imposition of Judgment

/s/ Philip M. Pro
Signature of Judge

PHILIP M. PRO, CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

December 11, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TWO HUNDRED AND FOUR (204) MONTHS AS TO COUNTS 1, 2, 4, 6, 8 AND 10, TO RUN CONCURRENT: EIGHTY-FOUR (84) MONTHS AS TO

COUNT 11, TO RUN CONSECUTIVE TO COUNTS 1, 2, 4, 6, 8 AND 10, FOR A TOTAL OF TWO HUNDRED EIGHTY-EIGHT (288) MONTHS, WITH CREDIT FOR TIME SERVED

X The court makes the following recommendations to the Bureau of Prisons:

The defendant be incarcerated at the Federal Medical Facility at Butner or Rochester.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation of Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

THREE (3) YEARS AS TO COUNT 1; FIVE (5) YEARS AS TO COUNTS 2, 4, 6, 8, 10 AND 11, CONCURRENT, FOR A TOTAL OF FIVE (5) YEARS

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The Defendant shall refrain from any unlawful use of a controlled substance and shall submit to one drug

test within 15 days of the commencement of supervision and at least two periodic drug tests thereafter, not to exceed 104 drug tests annually. Revocation is mandatory for refusal to comply.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places wher controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. You shall not possess, have under your control, or have access to any firearm, explosive device, or other dangerous weapons, as defined by federal, state, or local law.

2. You shall submit to the search of your person, property, residence or automobile under your control by the probation officer, or any other authorized person under the immediate and personal

supervision of the probation officer without a search warrant to ensure compliance with all conditions of release.

3. You shall participate in and successfully complete a substance abuse treatment program, which will include drug/alcohol testing, outpatient counseling, or residential placement, as approved and directed by the probation officer.

4. You shall participate in and successfully complete a mental health treatment program, which may include testing, evaluation, medication management, outpatient counseling or residential placement, as approved and directed by the probation officer.

5. You shall report, in person, to the probation office in the district to which you are released within 72 hours of discharge from custody.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth on Sheet 6.

	Assessment	Fine	Restitution
TOTALS:	**$ 700.00**	**$**	**$ 132,220.00**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ 0	$ 0	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $700.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or
☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

THE RESTITUTION AMOUNT IS DUE AND PAYABLE AT THE RATE OF ONE-THIRD OF DEFENDANT'S PRISON EARNINGS AND, THEREAFTER, AT THE RATE OF 10% OF DEFENDANT'S EARNINGS WHILE ON SUPERVISED RELEASE.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

SEE ORDER OF FORFEITURE

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL ANTHONY CERNAK, Defendant-Appellant.	No. 06-10762 D.C. No. CR-03-00534-PMP District of Nevada, Las Vegas ORDER (Filed Jan. 9, 2009)

Before: O'SCANNLAIN, GOULD and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

18 U.S.C. §924(c)(1)(A)(ii) Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

* * *

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

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18 U.S.C. §2113(a) and (d). Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny –

Shall be fined under this title or imprisoned not more than twenty years, or both.

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 3553. Imposition of a sentence

(c) Statement of Reasons for Imposing a Sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,

and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. §3742(a) and (f). Review of a sentence

(a) Appeal by a Defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

* * *

(f) Decision and Disposition. – If the court of appeals determines that –

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the

sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

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28 USC §1254(1). Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

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28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

Fed. R. Crim. P. Rule 11(b)(1)(N) Pleas

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

U.S.S.G. §3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in § 3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.

(b) Exclude from the application of §§ 3D1.2-3D1.5 the following:

(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of § 5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

U.S.S.G. §3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: **(a)** When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. §3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance

with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, **i.e.**, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

U.S.S.G. §3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Offense Level
1	none
1 ½	add 1 level
2	add 2 levels
2 ½-3	add 3 levels
3 ½-5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each

Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

U.S.S.G. §3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA Plaintiff, vs MICHAEL CERNAK, Defendant.	CR-S-03-534 PMP (RJJ) **PLEA MEMORANDUM** (Filed Sep. 1, 2006)

The United States, by and through Daniel G. Bogden, United States Attorney, and Patrick Walsh, Assistant United States Attorney, Michael Cernak and defendant's attorney, Rene Valladares, submit this plea memorandum.

I.

PLEA AGREEMENT

The United States and defendant have reached the following plea agreement, which is not binding on the Court:

A. The Plea

Defendant will plead guilty to Counts I, II, IV, VI, VIII, X, XI of the indictment charging Bank Robbery and Armed Bank Robbery in violation of Title 18, United States Code, Section 2113(a), and Possession of A Firearm In Relation to A Crime of Violence, in violation of Title 18, United States Code, Section 924(c). The Defendant will also agree to the forfeiture of the items listed in Counts XII and XIII. In exchange for his plea, the United States will dismiss the remaining counts at sentencing.

B. Additional Charges

The United States Attorney's Office for the District of Nevada ("United States") will bring no additional charge or charges against defendant arising out of the investigation in the District of Nevada which culminated in this Plea Memorandum.

C. Sentencing Guideline Calculations

Defendant understands that the Court is required to consider United States Sentencing Guidelines

("U.S.S.G." or "Sentencing Guidelines") among other factors in determining defendant's sentence. Defendant understands that the Sentencing Guidelines are advisory, and that after considering the Sentencing Guidelines, the Court may be free to exercise its discretion to impose any reasonable sentence up to the maximum set by statute for the crimes of conviction.

The parties agree to the following calculations of the Sentencing Guidelines:

1. The Base Offense Level for Counts I, II, IV, VI, VIII, and X is 20. (§2B3.1(a))

2. Two levels are added to Counts I, II, IV, VI, VIII, and X because property was taken from a financial institution. (2B3.1(b)(1)

3. A five level increase applies because a firearm was possessed in counts II, IV, VI and VIII. (§2B3.1(b)(2)). A firearm was also possessed in Count X, but no points are added because the defendant is pleading guilty to count XI (carrying a firearm in relation to a drug-trafficking offense).

4. The following points should be added to because the loss on these counts exceeded $10,000: I – 1 point, II – 1 point, IV – 1 point, VI – 1 point, VIII – 2 points, and X – 2 points. (§2B3.1(b)(7)).

5. Four points are added under USSG §3D1.4.

6. The Combined Offense Level for Counts I, II, IV, VI, VIII, and X is 34. (§3D1.4).

7. Pursuant to USSG §3E1.1(a) the United States will recommend that defendant receive a two-level adjustment for acceptance of responsibility unless defendant (a) fails to make a complete factual basis for the guilty plea at the time it is entered; (b) is untruthful with the Court or probation officers; (c) denies involvement in the offense or provides conflicting statements regarding defendant's involvement; (d) attempts to withdraw the guilty plea; (e) engages in criminal conduct; (f) fails to appear in court; or (g) violates the conditions of pretrial release.

8. Under USSG §3E1.1(b), the United States will, in its sole discretion, make a motion for an additional one-level adjustment for acceptance of responsibility prior to sentencing if defendant timely notifies the United States of defendant's intention to plead guilty, thereby permitting the United States to avoid preparing for trial and allowing for the efficient allocation of resources.

9. Defendant agrees that the Court may consider any counts dismissed under this agreement, along with all other relevant conduct whether charged or uncharged, in determining the applicable sentencing guidelines range, the propriety and extent of any departure from that range, and the determination of the sentence to be imposed after consideration of the sentencing guidelines and all other relevant factors.

10. With respect to Count XI, Carrying a Firearm During and In Relation to a Crime of Violence, the defendant must serve a mandatory seven-year

term of imprisonment, consecutive to the sentence for Counts I, II, IV, VI, VIII, and X. (18 U.S.C. §924(c)(1)(A)(ii) & §2K2.4(b))

11. Defendant's Criminal History Category will be determined by the Court.

D. Other Sentencing Matters

1. The United States will recommend a sentence of 288 months (24 years) imprisonment. The Defendant will recommend a sentence of 204 months (17 years) imprisonment. In exchange for the concessions made by the Government in this plea agreement, the Defendant agrees he cannot request a sentence below seventeen years imprisonment.

2. The parties agree that the Guideline calculations are based on information now known and could change upon investigation by the United States Probation Office. It is possible that factors unknown or unforeseen by the parties to the plea agreement may be considered in determining the offense level, specific offense characteristics, and other related factors. In that event, defendant will not withdraw defendant's plea of guilty.

3. The stipulations in this agreement do not bind either the United States Probation Office or the court. Both defendant and the United States are free to: (a) supplement the facts by supplying relevant information to the United States Probation Office and

the court, and (b) correct any and all factual misstatements relating to the calculation of the sentence.

4. The Defendant specifically agrees that a sentence of twenty-four years or less is a "reasonable" sentence under *United States v. Booker*, 543 U.S. 220 (2005). The Defendant understands that this sentence would likely be above the applicable sentencing guideline range as determined by the Court.

E. Fines and Special Assessment

1. Defendant agrees that the court may impose a fine due and payable immediately upon sentencing.

2. Defendant will pay the special assessment of $100 per count of conviction at the time of sentencing.

F. Restitution

Defendant agrees to make full restitution in an amount to be determined by the Court, which defendant agrees shall include all relevant conduct as determined by the Court. In return for defendant agreeing to make restitution for relevant conduct, the United States agrees not to bring charges against defendant for the conduct giving rise to the relevant conduct. Defendant understands that any restitution imposed by the Court may not be discharged in whole or in part in any present or future bankruptcy proceeding.

G. Waiver of Appeal

In exchange for the concessions made by the United States in this plea agreement, defendant knowingly and expressly waives the right to appeal any sentence that is imposed at twenty-five years or less or consistent with the parties joint recommendation, further waives the right to appeal the manner in which that sentence was determined on the grounds set forth in Title 18, United States Code, Section 3742, and further waives the right to appeal any other aspect of the conviction or sentence, including any order of restitution. Defendant reserves only the right to appeal any portion of the sentence that is higher than twenty-four years imprisonment. Defendant specifically waives his right to appeal the denial of his motion to suppress.

Notwithstanding the stipulations in this agreement, the parties are free to argue on appeal and collateral review that the Court's sentencing guidelines calculations are not error. However, each party agrees to maintain its view that the calculations in paragraph C are consistent with the facts of this case.

H. Additional Promises, Agreements, and Conditions

1. In exchange for the United States entering into this agreement, defendant agrees that (a) the facts set forth in Section IV of this Plea Agreement shall be admissible against defendant under Fed. R. Evidence. 801(d)(2)(A) in the following circumstances:

(1) for any purpose at sentencing; and (2) in any subsequent proceeding, including a trial in the event defendant does not plead guilty or withdraws defendant's guilty plea, to impeach or rebut any evidence, argument or representation offered by or on defendant's behalf; and (b) defendant expressly waives any and all rights under Fed. R. Criminal P. 11(f) and Fed. R. Evid. 410 with regard to the facts set forth in Section IV of the Plea Agreement to the extent set forth above.

2. The parties agree that no promises, agreements, and conditions have been entered into other than those set forth in this plea memorandum, and not will be entered into unless in writing and signed by all parties.

I. Limitations

This Plea Agreement is limited to the United States Attorney's Office for the District of Nevada and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authority. However, this Plea Memorandum does not prohibit the United States through any agency thereof, the United States Attorney's office for the District of Nevada, or any third party from initiating or prosecuting any civil proceeding directly or indirectly involving defendant, including but not limited to, proceedings under the False Claims Act relating to potential civil monetary liability or by the Internal Revenue Service relating to potential tax liability.

II.

PENALTY

1. The maximum penalty for violating Title 18, United States Code, Section 2113(a) is not more than 20 years imprisonment, a fine of not more than two-hundred fifty thousand dollars ($250,000), or both, for each count of conviction.

2. The maximum penalty for violating Title 18, United States Code, Section 924(c) is not more than life imprisonment, with a mandatory minimum sentence of 7 years, consecutive to any other term of imprisonment.

3. Defendant is subject to supervised release for a term not exceeding five (5) years.

Supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above.

4. Defendant must pay a special assessment of one-hundred ($100) for each count of conviction.

5. Defendant is required to pay for the costs of imprisonment, probation, and supervised release, unless defendant establishes that defendant does not

have the ability to pay such costs, in which case the court may impose an alternative sanction such as community service.

III.

ELEMENTS

Count I, II, IV, VI, VIII, X

The essential elements for the crime of Bank Robbery, Title 18, United States Code, Section 2113(a) are the following:

1. The Defendant took money belonging to the a [sic] bank or other financial institution.

2. The defendant used force and violence, or intimidation in doing so; and

3. The deposits of the Bank or financial institution were then insured by the Federal Deposit Insurance Corporation.

Counts XI

The essential elements for the crime of Carrying a Firearm During and in Relation to a Crime of Violence, Title 18, United States Code, Section 924(c) are the following:

1. The defendant committed the crime of Armed Robbery.

2. The defendant knowingly possessed or carried a firearm.

3. The defendant possessed or carried the firearm during and in relation to the crime of Armed Robbery.

IV.

FACTS THAT SUPPORT GUILTY PLEA

1. The defendant is pleading guilty because the defendant is guilty of the charged offenses.

2. In pleading to the offenses, the defendant acknowledges that if the defendant elected to go to trial instead of entering this plea, the United States could prove facts sufficient to establish the defendant's guilt beyond a reasonable doubt.

3. The defendant specifically admits and declares under penalty of perjury that all of the facts set forth below are true and correct:

Count 1: Bank Robbery

4. On or about November 13, 2001 the defendant took $13,200 in U.S. Currency belonging to the Nevada First Bank. He took this money from the employees of Nevada First Bank.

5. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

6. At the time the defendant committed this offense the deposits of the Nevada First Bank were insured by the Federal Deposit Insurance Corporation.

Count II: Armed Bank Robbery

7. On or about April 11, 2002 the defendant took $20,000 in U.S. Currency belonging to the Bank of America. He took this money from the employees of Bank of America.

8. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

9. Cernak possessed a firearm during the commission of this robbery.

10. At the time the defendant committed this offense the deposits of the Bank of America were insured by the Federal Deposit Insurance Corporation.

Count IV: Armed Bank Robbery

11. On or about July 26, 2002 the defendant took $6,500 in U.S. Currency belonging to the Bank of America. He took this money from the employees of Bank of America.

12. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

13. Cernak possessed a firearm during the commission of this robbery.

14. At the time the defendant committed this offense the deposits of the Bank of America were insured by the Federal Deposit Insurance Corporation.

Count VI: Armed Bank Robbery

15. On or about September 6, 2002 the defendant took $12,520 in U.S. Currency belonging to the Bank of America. He took this money from the employees of Bank of America.

16. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

17. Cernak possessed a firearm during the commission of this robbery.

18. At the time the defendant committed this offense the deposits of the Bank of America were insured by the Federal Deposit Insurance Corporation.

Count VIII: Armed Bank Robbery

19. On or about December 13, 2002 the defendant took $80,000 in U.S. Currency belonging to the Community Bank of Nevada. He took this money from the employees of Community Bank of Nevada.

20. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

21. Cernak possessed a firearm during the commission of this robbery.

22. At the time the defendant committed this offense the deposits of the Community Bank of Nevada were insured by the Federal Deposit Insurance Corporation.

Count X: Armed Bank Robbery

23. On or about November 10, 2003 the defendant took $62,440 in U.S. Currency belonging to the Wells Fargo Bank. He took this money from the employees of Wells Fargo Bank.

24. In the commission of this offense the defendant used force and violence, or intimidation by giving the bank teller a demand note that threatened her with bodily harm, if she did not comply with his demand for money.

25. Cernak possessed a firearm during the commission of this robbery.

26. At the time the defendant committed this offense the deposits of the Wells Fargo Bank were insured by the Federal Deposit Insurance Corporation.

Count XI: Possession of a Firearm During and In Relation to a Crime of Violence

27. On or about November 10, 2003 the defendant committed the crime of Armed Bank Robbery.

28. During the commission of that crime, the defendant possessed a S & W Desert Eagle .40 caliber semi-automatic pistol.

29. The defendant possessed or carried the firearm during and in relation to the crime of Armed Robbery. The defendant brandished this firearm by showing it to a bank employee while threatening the employee.

30. All of the acts listed in all counts above occurred in the State and federal district of Nevada.

V.

ACKNOWLEDGMENT

1. Defendant, acknowledges by defendant's signature below that defendant has read this Memorandum of Plea Agreement, that defendant understands the terms and conditions, and the factual

basis set forth herein, that defendant has discussed these matters with defendant's attorney, and that the matters set forth in this memorandum, including the facts set forth in Part IV above are true and correct.

2. Defendant acknowledges that defendant has been advised, and understands, that by entering a plea of guilty defendant is waiving, that is, giving up, certain rights guaranteed to defendant by law and by the Constitution of the United States. Specifically, defendant is giving up:

a. The right to proceed to trial by jury on the original charges, or to a trial by a judge if defendant and the United States both agree;

b. The right to confront the witnesses against defendant at such a trial, and to cross-examine them;

c. The right to remain silent at such trial, with such silence not to be used against defendant in any way;

d. The right, should defendant so choose, to testify in defendant's own behalf at such a trial;

e. The right to compel witnesses to appear at such a trial, and to testify in defendant's behalf; and,

f. The right to have the assistance of an attorney at all stages of such proceedings.

3. Defendant, defendant's attorney, and the attorney for the United States acknowledge that this

Plea Memorandum contains the entire agreement negotiated and agreed to by and between the parties, and that no other promise has been made or implied by either defendant, defendant's attorney, or the attorney for the United States.

DANIEL G. BOGDEN
United States Attorney

9/14/2006 — DATED

/s/ Patrick Walsh
PATRICK WALSH
Assistant United
States Attorney

9/13/06 — DATED

/s/ Michael Cernak
MICHAEL CERNAK
Defendant

9/13/06 — DATED

/s/ R V
RENEE VALLADARES
Counsel for Defendant